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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

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No. 170

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ESTATE OF FLORENCE ALTHEA GIBB, Deceased, ALTHEA GIBB HUNTER, MALCOLM DU BOIS HUNTER and CHARLES S. MCVEIGH, Executors, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE

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**On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit**

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Tax Court (R. 222-229) is reported in 6 T.C. 1088. The *per curiam* opinion of

the Circuit Court of Appeals (R. 242) is reported in 167 F. 2d 633.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1948. (R. 243.) The petition for a writ of certiorari was filed on July 21, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether a transfer in trust, made on March 10, 1930, was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 811(c) of the Internal Revenue Code where the decedent retained the income for life and a contingent reversionary interest in the corpus.

## STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 16-19.

## STATEMENT

The facts found by the Tax Court (R. 223-226), taken chiefly from a stipulation of facts filed by the parties (R. 16-51), may be summarized as follows:

Florence Althea Gibb (hereinafter called the "decedent") was born on October 7, 1864, and died May 17, 1941, a resident of Nassau County,

New York. Her daughter, Althea Gibb Hunter, was born on November 18, 1892, and is the mother of four children born on the following dates:

Mary Althea Eldredge, April 6, 1919
Elaine Gibb Eldredge, April 6, 1919
Edward Irving Eldredge, March 31, 1921
Florence Hunter, May 5, 1928

Decedent's daughter and granchildren survived her and since decedent's death four children of decedent's grandchildren have been born and are now living. (R. 223.)

Althea Gibb Hunter (decedent's daughter), Malcolm DuBois Hunter and Charles S. McVeigh are the executors of the decedent's estate. As such, they filed an estate tax return for the decedent's estate which did not include the value of a trust created by decedent on March 10, 1930, for the future benefit of her daughter and the daughter's descendants. The Commissioner determined a deficiency based on the inclusion of the entire value of the assets of this trust in the decedent's gross estate. (R. 223, 226.)

In 1930, the year in which the decedent created this trust, the value of her estate was approximately $10,000,000. (R. 226.) The value of the trust on the date it was created was approximately $1,000,000 and the value of the corpus on the date of decedent's death was $1,106,190.57. (R. 223-224.)

The deed of trust executed by the decedent on March 10, 1939, transferred certain property to the Brooklyn Trust Company as trustee to be held and administered as provided by the terms of the deed of trust. (R. 223.) The trust instrument (R. 39-49), after providing that the income be paid to the grantor for life, continued as follows (R. 40-41):

> 1. Upon the death of the Grantor the Trustee shall continue to hold the Trust Estate in trust for and during the lifetime of the Grantor's daughter ALTHEA GIBB HUNTER, and shall collect and receive the said interest, dividends, profits and income and after paying thereout all the costs, charges and expenses of whatsoever kind and nature incurred in the maintenance of the Trust Estate, shall pay over the net income to said Althea Gibb Hunter for and during the term of her natural life and upon her death the Trustee shall transfer, pay over and deliver the Trust Estate to the issue of the said Althea Gibb Hunter who shall survive her, their heirs, executors, administrators and assigns, in equal shares per stirpes however and not per capita, absolutely and forever, and if the said Althea Gibb Hunter shall leave no issue who shall survive her, then and in that event, upon her death the Trustee shall transfer, pay over and deliver the Trust Estate to those persons or institutions and in the shares, proportions or amounts in which they would, in that event, be entitled to receive the same under and pur-

suant to the provisions of the Last Will and Testament of the Grantor which shall cover the disposition of her residuary estate under such conditions.

2. Upon the death of the Grantor, if the said Althea Gibb Hunter shall have predeceased her leaving issue who shall survive the Grantor, then and in that event upon the death of the Grantor the Trustee shall divide the Trust Estate into equal shares or parts, one share for each child of the said Althea Gibb Hunter who shall survive the Grantor and one share for the issue taken collectively of each child of the said Althea Gibb Hunter who shall predecease the Grantor, leaving issue who shall survive the Grantor, such division however to be made among the descendants of the said Althea Gibb Hunter who shall be alive at the time of the death of the Grantor, per stirpes and not per capita.

* * *

Three subparagraphs, numbered A, B and C, give further directions as to the disposition of the trust property in the event shares are set aside for Althea Gibb Hunter's children as provided in subparagraph 2, quoted above. Subparagraph A (R. 41-42) provides that any share set apart for a child of Althea Gibb Hunter "who shall be alive upon the date of this Indenture and who shall survive the Grantor" (R. 41) shall be held in trust during the child's lifetime, that the net income

from the share shall be applied for the child's benefit during his or her minority and thereafter paid to him or her for life, that upon the death of the child the share shall be paid over absolutely to such issue of the child as survive the child, that in default of such issue, the share shall be paid over absolutely to the issue of Althea Gibb Hunter who survive such child and that (R. 42):

> in default of such issue the Trustee shall upon the death of such child transfer, pay over and deliver such share to those persons or institutions and in the shares, proportions or amounts in which they would, in that event, be entitled to receive the same under and pursuant to the provisions of the Last Will and Testament of the Grantor which shall cover the disposition of her residuary estate under such conditions.

Subparagraph B provides that any share set apart for a child of Althea Gibb Hunter who shall not be in being upon the date of the trust indenture but shall be born thereafter and shall survive the decedent shall, at the decedent's death, be transferred outright to the child for whom the share is set apart. (R. 42.) Under subparagraph C absolute delivery is also to be made at the decedent's death as to each sub-share set apart for a descendant of any child of Althea Gibb Hunter who shall die after the date of the trust indenture and be-

fore the date of the decedent's death leaving issue who survive the decedent. (R. 42.)

The trust instrument contains no provision for disposition of the trust property at the decedent's death in the event the decedent's daughter, Althea Gibb Hunter, and her descendants all predecease the decedent.

The decedent executed a number of wills. In none of them was any reference made to the indenture of trust or the power of appointment referred to in the indenture of trust.[1] One of these wills was executed prior to the date of the creation of the trust. (R. 225.)

In the decedent's last will and testament, dated January 17, 1938, the decedent's disposition of her residuary estate was substantially similar to the provisions for disposition after her death of the property she transferred in trust on March 10, 1930. (See paragraph Twelfth of will, R. 21-25, summarized in the Tax Court's findings of fact, R. 225.)

The theoretical value at the time of decedent's death of the possibility that the trust property should be distributable pursuant to the residuary

[1] However, in four of the wills, the decedent's residuary estate was stated to include property "over which I [the decedent] shall at the time of my death have power of appointment" (R. 92, 119, 147, 174) and in the two most recent wills the residuary estate was stated to include property "over which I have or shall have at the time of my death any power of appointment" (R. 21, 201).

clause of her will, as computed by a qualified actuary using the Actuaries, or Combined Experience Table of Mortality, with four percent interest, was $1,070.79. (R. 226.)

On the basis of these facts the Tax Court held that the transfer in trust dated March 10, 1930, was one intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code. (R. 226-229.) The Circuit Court of Appeals affirmed. (R. 242.)

**ARGUMENT**

Both the Tax Court and the Circuit Court of Appeals correctly held that this case is controlled by *Fidelity Co.* v. *Rothensies,* 324 U. S. 108. In that case, the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. This Court, utilizing the principles set forth in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock,* 309 U. S. 106, held the full value of the corpus includible in the grantor's gross estate as a transfer intended to take effect in possession or enjoyment at or after

the grantor's death under Section 302 (c) of the Revenue Act of 1926, which has been carried forward into Section 811(c) of the Internal Revenue Code (Appendix, *infra*). In so holding the Court said (pp. 111-112):

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

The facts of the instant case are strikingly similar to those in the *Fidelity Co.* case and there is no material distinction. Therefore, there is no basis for certiorari. And see *Commissioner* v.

*Estate of Field,* 324 U. S. 113; *Goldstone* v. *United States,* 325 U. S. 687; *Eldredge* v. *Rothensies,* 150 F. 2d 23 (C. C. A. 3d), certiorari denied, 326 U. S. 772.

In support of their application for certiorari, the taxpayers urge (Pet. 6, 12-13) that the *Fidelity Co.* case is distinguisable because there no children were born to the daughters until after the grantor's death and the grantor exercised her power of appointment. But such distinctions are plainly immaterial because they do not detract from the basic considerations that here, as in the *Fidelity Co.* case, all the provisions for distribution of the corpus were made with reference to the grantor's death and the grantor specifically retained a reversionary interest, thus holding in suspense and delaying until her death or thereafter the ripening of full dominion over the property by the beneficiaries. Similar distinctions were unsuccessfully urged by the taxpayers in the *Eldredge* case, *supra,* where the tax was sustained and certiorari was denied.

The taxpayers also contend (Pet. 6-10) that the instant decision conflicts with the decision of the Third Circuit in *Commissioner* v. *Estate of Church,* now pending before this Court, No. 5, October Term, 1948; and they say that since this Court has ordered reargument of that case and the *Spiegel* case (*Estate of Spiegel* v. *Commissioner,* No. 3, October Term, 1948) and has requested discussion

of certain questions, including the question whether *May* v. *Heiner,* 281 U. S. 238, and *Hasset* v. *Welch,* 303 U. S. 303, can continue to stand in the light of subsequent authority, therefore certiorari should be granted not only to resolve the conflict but to present other facets of the important questions upon which this Court has requested reargument. But plainly the taxpayers are in error and there is no such conflict with the *Church* case as would make it necessary or advisable for this Court to grant certiorari here. In the *Church* case, the grantor did not expressly retain a reversionary interest in the corpus and the basic question presented in that case is whether a possibility of reversion by operation of law is as effective as one expressly reserved to support taxability. A subsidiary question presented is whether under the *Dobson* rule (*Dobson* v. *Commissioner,* 320 U. S. 489), the Circuit Court of Appeals had power to reverse the Tax Court's decision. In the instant case it is true that there was a possibility of reversion by operation of law if the grantor survived all the beneficiaries, and indeed the Circuit Court of Appeals noted this by citing the *Bayne* case (*Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d)) in its *per curiam* opinion; but as stated above, this was not the only string on the corpus that the grantor kept: here there was the express retention of a contingent power of appointment which brings the case directly within

the scope of this Court's decision in the *Fidelity Co.* case. Hence there is no necessity here to go into the problems peculiar to the *Spiegel* and *Church* cases where there was no explicit retention of a reversionary interest.

The taxpayers present (Pet. 10-13) an erroneous contention to the effect that nothing passed from the grantor at death. This ignores the fundamental consideration, recognized by the Tax Court (R. 228), that up to the time she died the decedent could have changed her will so as possibly to affect the devolution of the trust property. Her death cut off that possibility. This is enough to satisfy the requirement of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, that something must pass from the decedent at death; and in the *Fidelity Co.* case it was expressly so held. See 324 U. S. at p. 111.[2] It is of no moment whether the interests of the beneficiaries were vested or contingent so long as there was a possibility of reversion or control. *Commissioner* v. *Estate of Field*, 324 U. S. 113, 116. We need not here go into decisions of the lower courts such as *Commissioner* v. *Singer's Estate*, 161 F. 2d 15 (C. C. A. 2d),

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[2] This Court there said:

> The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability.

cited by taxpayers. (Pet. 10, 11, 13, 14.) If it be considered that the *Singer* case is to any extent at variance with the *Fidelity Co.* case or the instant one, it should of course to that extent be disregarded as erroneous.

The taxpayers say (Pet. 14-16) that taxation should not depend upon the existence of a remote possibility of reversion by operation of law and that is the basic issue presented to this Court in the *Spiegel* and *Church* cases. But as above pointed out, there was more than that here. Here we have the explicit retention of a contingent power of appointment which brings this case precisely within the ambit of the *Fidelity Co.* decision and there is no need to consider any additional grounds for taxability.

On pages 16-18 of their application for certiorari, the taxpayers assert that the Tax Court erred in not making findings with respect to the decedent's actual intent, rather than her intent as reflected by the terms of the trust instrument. The testimony before the Tax Court, as we view it, is not inconsistent with the decedent's intent as expressed in the trust instrument (see R. 59, 61, 63, 66, 69, 76-78), but the testimony is in any event irrelevant. It is the inescapable rationale of this Court's decisions that an objective, rather than a subjective, standard of intent is envisaged by Section 811 (c). We submit that the Tax Court in the instant case made no error in this connec-

tion. It carefully considered the evidence adduced and concluded (R. 227-228)—

> that the decedent was fully aware of the provisions of the trust instrument and by executing the instrument approved those provisions; in other words, we think that the intention of the grantor must be gathered from the words of the trust instrument.

Moreover, taxpayers' argument is without foundation. In all of these cases where the ultimate disposition of the trust property must await the death of the grantor, the transfer is necessarily intended to take effect in possession or enjoyment at or after the grantor's death as a matter of fact. And indeed this was recognized by this Court in *Reinecke* v. *Northern Trust Co., supra*, 278 U. S. at p. 347. The only question at issue is whether it was so intended as a matter of law. And certainly where, as here, the grantor reserved the income for life and had a reversionary interest in the corpus, it was impossible for anybody except herself to obtain full dominion over the property until after she died. We submit that there is no plausible or consistent basis for any argument that she did not intend the result that was actually achieved. In view of the foregoing it is plain that the Tax Court made no error in either its findings or its conclusion in this case.

## CONCLUSION

The decision is correct; there is no essential conflict; the petition should be denied.

Respectfully submitted,

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August, 1948.

## APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * *

(26 U.S.C. 811)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event

or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * *

*Example* (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i.e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life

estate and the remainder is, therefore, includible in the decedent's gross estate.

* * * *

*Example* (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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